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No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,
v.
RAYMOND LEVI COBB,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Table of Contents i

Index of Authorities ii

Argument 1

I. Cobb Does Not Deny a Deep Split in State and Federal Courts over the Application of *Michigan v. Jackson*. 1

II. The "Closely Related" Exception to *McNeil v. Wisconsin* Has Not Been Consistently Developed by the States and the Federal Circuits. 4

III. The Texas Court of Criminal Appeals's Decision Does Not Rest on Any State Grounds. 9

Conclusion 9

INDEX OF AUTHORITIES

Cases

Coleman v. Thompson, 501 U.S. 722 (1991) 9

Commonwealth v. Rainwater, 681 N.E.2d 1218 (Mass. 1997) 7

Dew v. United States, 558 A.2d 1112 (D.C. 1989) 3

Edwards v. Arizona, 451 U.S. 477 (1981) 2

Holloway v. State, 780 S.W.2d 787 (Tex. Crim. App. 1989) 3

In re Pack, 616 A.2d 1006 (Pa. Super. 1992) 7

Maine v. Moulton, 474 U.S. 159 (1985) 4, 5

McNeil v. Wisconsin, 501 U.S. 171 (1991) 4

Michigan v. Harvey, 494 U.S. 344 (1990) 2

Michigan v. Jackson, 475 U.S. 625 (1986) 1, 2

Michigan v. Long, 463 U.S. 1032 (1983) 9

Montoya v. Collins, 955 F.2d 279 (CA5 1992) 3

Pennsylvania v. Labron, 518 U.S. 938 (1996) 9

People v. Clankie, 530 N.E.2d 448 (Ill. 1988) 4, 6

Solem v. Stumes, 465 U.S. 638 (1984) 2

United States v. Arnold, 106 F.3d 37 (CA3 1997) 7

United States v. Cooper, 949 F.2d 737 (CA5 1991) ... 6, 8

United States v. Covarrubias,179 F.3d 1219 (CA9 1999) 7

United States v. Doherty, 126 F.3d 769 (CA6 1997) 4

United States v. Harrison, No. 99-10496, 2000 WL 684805 (CA9 May 30, 2000) 2, 3

United States v. Melgar, 139 F.3d 1005 (CA4 1998) .. 5, 7

United States v. Williams, 993 F.2d 451 (CA5 1993) 6

Whittlesey v. State, 665 A.2d 223 (Md. 1995) 4-7

Wilcher v. Hargett, 978 F.2d 872 (CA5 1992) 3

ARGUMENT

In his Brief in Opposition, not only has Cobb utterly failed to explain why the Court should not grant certiorari in this case, but he has even underscored why the Court *should* grant certiorari. The State briefly replies to Cobb's arguments as follows.

I. COBB DOES NOT DENY A DEEP SPLIT IN STATE AND FEDERAL COURTS OVER THE APPLICATION OF *MICHIGAN V. JACKSON*.

The first question presented in the State's petition was whether *Michigan v. Jackson*, 475 U.S. 625 (1986), prevents an accused from unilaterally waiving his Sixth Amendment right to counsel when he has made no previous "assertion" of that right beyond accepting appointed counsel. Pet., at i, 9-20. Cobb claims he can ignore this issue, however, because he had a "full-blown" and "on-going" relationship with his appointed attorney, Hal Ridley, throughout the State's murder investigation. Opp., at 5-7. Cobb has misunderstood the State's petition.

Question one assumes that Cobb had an attorney-client relationship with Ridley,[1] but then asks whether Cobb could have unilaterally waived his right to have counsel present during police interrogation. Pet., at 9-14. The Texas Court of Criminal Appeals held that Cobb's mere "acceptance" of appointed counsel triggered *Jackson* and presumptively barred Cobb's waiver. Pet., at 9. The State contends this was wrong under *Jackson* and its progeny and, moreover, that the court's error implicates a deep split among state and federal courts. *Id.*

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1. Question one even assumes that Cobb's Sixth Amendment right to counsel had attached to the as-yet-uncharged murders. Question two of the petition, however, demonstrates that, when Cobb confessed to the murders, his Sixth Amendment right to counsel had attached only to the burglary offense. Pet., at i, 21-30.

Cobb does not dispute the existence of the split. Nor does Cobb claim that the record shows that he *ever* affirmatively invoked his right to counsel. Indeed, the record shows that Cobb voluntarily talked to police on numerous occasions outside the presence of counsel. *See* Pet., at 20. Ignoring these issues, Cobb attempts to take refuge behind his "on-going" relationship with appointed counsel.

But implicit in *Jackson* is the idea that an accused, having established a relationship with his appointed attorney, may nonetheless validly waive his right to have counsel present during an interrogation. *See Jackson*, 475 U.S. at 626 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Solem v. Stumes*, 465 U.S. 638 (1984)). The Court made this explicit when, following *Jackson*, it stated that "[n]othing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) (emphasis added); Pet., at 11 n.5. The issue here, as the Court of Criminal Appeals recognized,[2] is whether *Jackson* restricted the circumstances under which Cobb could validly waive the right to counsel. Pet., at 12-14.

Cobb's underlying position appears to be that his on-going relationship with Ridley was itself an "assertion" of his right to counsel sufficient to trigger *Jackson*. If this is Cobb's argument, he offers no authority for it. Ironically, however, the Ninth Circuit Court of Appeals issued an opinion on May 30, 2000, that superficially supports Cobb's position. *See United States v.*

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2. Incredibly, Cobb claims that the "decision by the Texas Court of Criminal Appeals has little, if any, application to this question." Opp., at 5. This is a mystifying claim, given that the court's opinion explicitly recognizes *twice* that Cobb's "assertion" of his right to counsel under *Jackson* was a pivotal issue. *See* Pet., at A-6, A-7.

Harrison, No. 99-10496, 2000 WL 684805 (CA9 May 30, 2000). In *Harrison*, the court held that an accused "invokes" his Sixth Amendment right to counsel under *Jackson* when (1) he retains counsel on an on-going basis to assist in a pending criminal investigation, (2) the government knows or should know about the representation, and (3) the government *then* indicts the defendant on "charges precisely anticipated by the scope of the pre-indictment investigation." 2000 WL 684805, at *8.

Harrison misreads *Jackson* and is wrongly decided, but that is beside the point here. At this stage, the Ninth Circuit's decision is significant because it further deepens the conflict surrounding the interpretation of *Jackson*. *See* Pet., at 14-19. *Harrison* distinguishes the Fifth Circuit's decisions in *Montoya v. Collins*, 955 F.2d 279, 283 (CA5 1992), and *Wilcher v. Hargett*, 978 F.2d 872, 874, 876 (CA5 1992), on the basis that neither case involved an accused's "affirmative act of retaining counsel." *Harrison*, 2000 WL 684805, at *5; *see* Pet., at 17-18. By drawing this meaningless distinction, the Ninth Circuit has aligned itself with cases from other jurisdictions that wrongfully equate "appointment of counsel" or a "relationship with counsel" with the "assertion" necessary to trigger *Jackson*. *See Holloway v. State*, 780 S.W.2d 787, 795 (Tex. Crim. App. 1989); *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989); Pet., at 15-16.

Far from explaining why the Court should not grant certiorari in this case, Cobb's argument shows that the conflict surrounding the application of *Jackson* has only deepened since the State filed its petition.

II. THE "CLOSELY RELATED" EXCEPTION TO *MCNEIL V. WISCONSIN* HAS NOT BEEN CONSISTENTLY DEVELOPED BY THE STATES AND THE FEDERAL CIRCUITS.

The Sixth Amendment right to counsel, as well as the *Jackson* fence around it, are "offense specific" and consequently apply only to offenses for which "adversary judicial criminal proceedings"—such as a formal charge or indictment—have been brought. *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991); Pet., at 22. Over the past decade, however, state and federal courts have developed an exception to this rule, under which the Sixth Amendment may attach to an uncharged offense if it is sufficiently "related" to a previously charged offense. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 232-26 (Md. 1995) (collecting cases). During that time, courts have expressed confusion about the degree of "relatedness" required to trigger the exception. *See, e.g., United States v. Doherty*, 126 F.3d 769, 776 (CA6 1997); *People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988). This Court has never adopted or rejected the exception, nor has it provided any guidance as to its application.

Question two in the State's petition tests the parameters of this "closely related" exception. Pet., at i. In his opposition, Cobb erroneously claims that this Court's own precedent—particularly *Maine v. Moulton*, 474 U.S. 159 (1985)—disposes of question two. Opp., at 7-11. He also mistakenly argues that lower courts' application of the exception forms a seamless web that does not merit this Court's attention. Opp., at 11-15.

Moulton addressed the government's "knowing exploitation" of the opportunity to surreptitiously interrogate a defendant outside the presence of counsel. 474 U.S., at 176; *see* Pet., at 22-23 (discussing *Moulton*). There, the government wired an informant, deliberately recorded an indicted defendant's incriminating statements, and used them at the defendant's trial on pending theft charges. 474 U.S., at 176-77. The Court held that the state violated the Sixth

Amendment by "knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.*, at 176.

Many state and federal courts have gleaned a "closely related" exception from a subsidiary aspect of *Moulton*. *See, e.g., United States v. Melgar*, 139 F.3d 1005, 1013 (CA4 1998). In *Moulton*, the state used the secret recording not only to bolster the pending theft charges, but also to add a burglary count to the indictment. 474 U.S., at 167. The theft charges concerned receiving stolen automobiles and parts; the added burglary charge concerned precisely the same items. *Id.* The defendant was convicted for both offenses. *Id.*

The Court reversed the convictions. *Id.*, at 180. The Court did not explicitly rule, however, that the defendant's Sixth Amendment right to counsel had attached to *both* the theft and the burglary charges. Instead, the Court simply held that use of the recorded statements to bolster the pending theft charge violated the Sixth Amendment. *Id.*, at 179-80. Significantly, the opinion is completely silent about the "relatedness" of the two charges.

Moulton's reasons for striking down both convictions are unclear. The Court seemed concerned primarily with the state's deliberate, surreptitious recording of an indicted defendant's conversation when it was certain that the defendant would incriminate himself as to the pending theft charge. *Id.*, at 176-77. The Court also may have reasoned that the improperly obtained statements incriminated the defendant for both theft and burglary. *See id.*, at 165-67. In any event, the Court's opinion contains *no* discussion of the factual or legal "relatedness" of the theft and burglary charges. Indeed, a leading case doubts whether *Moulton* gives rise to the "closely related" exception at all. *See Whittlesey*, 665 A.2d, at 233 & n.8.

Moulton does not answer question two in the State's petition. This case contains nothing like the deliberate, surreptitious circumvention of the Sixth Amendment in *Moulton*. Indeed, there is no hint of intentional police misconduct at all, and the Court of Criminal Appeals's opinion did not even address the issue. *See* Pet., at 3-6, 29; Pet., at A-7. Moreover, Cobb's murder confession *could not* have incriminated him on the burglary, because he had already confessed to it. Pet., at 28. Finally, Cobb was convicted of capital murder based on killing two persons in one transaction, and not based on burglary as a predicate felony. Pet., at 28-29. Cobb's statement, therefore, was never used against him with respect to the previously charged burglary, but only with respect to murder. Pet., at 28. In sum, even if *Moulton* contains an implicit "closely related" exception, it does not resolve whether the two charges were sufficiently related to require the conclusion that Cobb's lawyer for the burglary charge was necessarily his lawyer for the murder charge.

Cobb also errs in his reading of the state and federal courts' development of the "closely related" exception. Opp., at 11-13. A decade's worth of opinions has produced a bewildering kaleidoscope of factors that courts may apply to determine whether two offenses are "closely related," "very closely related," "extremely closely related," or "inextricably intertwined." *See Whittlesey*, 665 A.2d, at 234-35 (discussing cases). These are more than mere labels: application to this case shows that these shifting combinations of factors lead to diametrically opposed results depending on the circumstances of a given case.

For example, some courts have narrowly scrutinized the *conduct* underlying two separate charges to determine whether they are "closely related." *See, e.g., United States v. Williams*, 993 F.2d 451, 456 (CA5 1993); *United States v. Cooper*, 949 F.2d 737, 743-44 (CA5 1991); *Clankie*, 530 N.E.2d, at 452. Other courts have required that an allegedly improper interrogation have elicited

incriminating evidence as to the previously charged offense, or, relatedly, that the two offenses have *overlapping elements*. *See, e.g., Melgar*, 139 F.3d, at 1014-15; *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1224 (Mass. 1997); *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992).

In stark contrast to these cases, other courts have taken a broader view of the general factual situation giving rise to the two offenses. For example, in *United States v. Covarrubias*, the Ninth Circuit posited an extremely broad test, requiring "an examination and comparison of all of the facts and circumstances relating to the conduct involved." 179 F.3d 1219, 1225 (CA9 1999); *see also United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997) (looking to "similarities of time, place, person, and conduct" to determine "whether the same acts and factual predicates underlie both the pending and the new charges"). A leading case has posited that courts may take a more expansive view of the "closely related" exception where "there is evidence of deliberate police misconduct," *Whittlesey*, 665 A.2d, at 234-35, but the analytical relationship between these factors remains murky.[3]

This cornucopia of factors yields starkly different results when applied to the facts in *Cobb*. If "conduct" is the touchstone, then the burglary and murder charges at issue are clearly unrelated: the

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3. Cobb waxes on about the "law enforcement misconduct" issues in this case. Opp., at 15-18. His discussion, however, merely confirms *Whittlesey*'s observation that courts may consider evidence of deliberate police misconduct when assessing the "relatedness" of charged and uncharged offenses. Cobb does not bother to explain why the Court of Criminal Appeals's opinion does not contain a single word about police misconduct. That is so because there was not the slightest hint that the police deliberately attempted to circumvent Cobb's right to consult with counsel. Pet., at 29. Police misconduct is simply not an issue in this case.

burglary consisted of Cobb's entering the Owings' home with the intent to steal their property, while the murder involved his brutal killing of Maggie and Kori Rae. Pet., at 27-28. The charges are also unrelated if considered from an "evidence" standpoint: the evidence gathered from Cobb's confession to murder was not used, and indeed *could not be used*, to convict Cobb of a burglary he had already admitted to. Pet., at 28. By the same token, burglary was not the predicate felony for Cobb's capital murder conviction. Pet., at D-4, E-2. In a practical sense, then, Cobb's murder confession was never used to "prove" anything about the previously charged burglary.

Application of a broader, "fact-based" test could achieve the opposite result. A court might conclude that, because the burglary and the murder fortuitously occurred during similar times and places, both offenses shared the same "factual predicate" and were therefore "closely related." Indeed, the Court of Criminal Appeals's analysis in *Cobb* rests on the foundation that "the capital murder offense . . . was factually interwoven with the burglary." Pet., at A-7.

Cobb has thus failed to consider the complexity of the "closely related" exception that has propagated in the lower courts over the last fifteen years. Cobb's offenses might be considered "inextricably intertwined" or "separate," depending on jurisdiction and geography. In fact, had Cobb been prosecuted in a Texas *federal* court, the court would have applied the narrow conduct-based test in *Cooper* and concluded that the burglary and the murders were based on wholly separate conduct.

Neither federal constitutional law nor the state's ability to investigate crime can tolerate these fortuitous and irrational differences.

III. THE TEXAS COURT OF CRIMINAL APPEALS'S DECISION DOES NOT REST ON ANY STATE GROUNDS.

Finally, Cobb improperly argues that, because Texas procedural law would permit the offenses of burglary and murder to be joined for trial if part of the same criminal transaction, the Court of Criminal Appeals's decision therefore rests on "adequate state law grounds." Opp., at 18-22. The "independent and adequate state law" doctrine bars the Court's review only when a state court decides a question of federal law but its decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The adequacy and independence of state grounds, moreover, must be "clear from the face of the [state court] opinion." *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). In this case, the Court of Criminal Appeals's decision is grounded wholly on the Sixth Amendment and does not even mention state law. *See* Pet., at A-6, A-7. Cobb concedes this, Opp., at 20, and thus his argument must fail.

CONCLUSION

The Court of Criminal Appeals's decision in this case implicates two important and unsettled areas of Sixth Amendment law. This Court should grant the State's petition to resolve these critical aspects of federal constitutional jurisprudence.

Respectfully submitted,

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